

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

76-1061

To be argued by
JOHN P. COONEY, JR.

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of 5

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1061

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD KESTENBAUM,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 76-1061

UNITED STATES OF AMERICA,

Appellee,

—against—

RICHARD KESTENBAUM,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard Kestenbaum appeals from a judgment, in the United States District Court for the Southern District of New York, rendered by the Honorable Kevin T. Duffy, United States District Judge, revoking his probation on October 14, 1975 and sentencing him on January 9, 1976 to a period of commitment not to exceed two years under the Youth Corrections Act.

Information 73 Cr. 212, filed on March 17, 1973, charged Kestenbaum in four counts with forging and uttering United States Treasury checks in violation of Title 18, United States Code, Section 495. On the same date, Kestenbaum pled guilty to Counts One and Two of this Information. On May 15, 1973, Judge Duffy sentenced Kestenbaum, under the Youth Corrections Act, Title 18, United States Code, Section 5010, to a two-year term of probation.*

* At the sentencing, Counts Three and Four of the Information were dismissed.

On February 21, 1975, the United States Probation Office filed a probation revocation petition in the District Court charging Kestenbaum with violation of his probation in five separate specifications. On that same date, Kestenbaum admitted his violation of one of the specifications and his probation was extended for a term of one year, to May 14, 1976.

On October 14, 1975, a second probation revocation petition was filed with the District Court. Upon Kestenbaum's admission to this second probation violation, Judge Duffy revoked Kestenbaum's probation, sentenced him to an additional two years probation on Count Two of the Information, and ordered, pursuant to 18 United States Code, Section 5010(e), that Kestenbaum be placed in a study to determine the appropriate sentence on Count One of the Information. On January 9, 1976, after the study had been completed, Kestenbaum was sentenced under the Youth Correction Act to imprisonment for term not to exceed two years on Count One.

ARGUMENT

POINT I

The probation revocation proceedings below satisfied the requirements of due process.

Kestenbaum contends in the most conclusory terms for the first time on appeal that due process was not accorded him in the revocation proceedings below. The only cognizable argument appears to be that he was not adequately notified of the ramifications of his admission to probation violations and therefore he suffered a "griev-

ous loss" of an undefined nature. (Br. at 6).* In effect, the defendant apparently contends that an allocution similar to that required by Rule 11 of the Federal Rules of Criminal Procedure is required for admissions to probation violation. This claim is meritless.

Kestenbaum has not referred to, nor has the Government been able to discover, any authority supporting this novel contention. First, even a cursory reading of the Federal Rules of Criminal Procedure reveal that Rule 11 has no application to probation revocation proceedings. By its express terms, Rule 11 applies only to the manner in which the Court must address a de-

* The defendant also appears to argue, although only in a head note, that the Court abused its discretion by imposing a sentence of two years imprisonment upon the revocation of probation and that the sentence was "harsh, cruel and unusual." (Br. at 3).

It is abundantly clear from the language of the applicable statute and its judicial interpretation that the Court, ". . . may revoke the probation . . . [and] impose any sentence which might originally have been imposed." 18 U.S.C. § 3653. See, e.g., *United States v. Yon*, 159 F.2d 688, 689 (2d Cir. 1947); *Dominguez v. Hunter*, 170 F.2d 546 (10th Cir. 1948); *Baber v. United States*, 368 F.2d 465 (5th Cir. 1966). Since Kestenbaum originally could have been sentenced to 10 years imprisonment under the penalty provided for in Title 18, United States Code, Section 495, it is frivolous to argue that the sentencing court abused its discretion in imposing a 2 year sentence or that this 2 year period of incarceration constituted "harsh, cruel and unusual" punishment. The long standing rule has been that an appellate court will not, except in the most extraordinary circumstances, review or reverse a sentence which is within statutory limits. *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); see also *Dorozynski v. United States*, 418 U.S. 424, 440-41 (1974); *United States v. Tucker*, 404 U.S. 443 (1972); *United States v. Hendrie*, 505 F.2d 1233 (2d Cir. 1974). Moreover, here the Court sentenced Kestenbaum only after having reviewed the results of a Section 501(b) study and having participated in several length discussions with attorneys and probation officers concerning Kestenbaum's rehabilitative efforts and progress.

fendant before accepting his plea of guilty. Many of the rule's prescriptions, such as the need to advise a defendant of his right to a jury trial, have no applicability whatsoever to a probation revocation proceeding. Moreover, Rule 32(f), which deals directly with probation revocation, provides only that "[t]he court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed." See *Escoe v. Zerbst*, 295 U.S. 490 (1935). There is thus no suggestion in the Criminal Rules that Rule 11 has any application to probation revocation proceedings.

Second, the defendant was in no way deprived of the rudiments of due process. The due process rights extended to a defendant in probation revocation proceedings are: (a) written notice of the claimed violations of probation; (b) disclosure of the evidence against the probationer; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached determiner of the facts; and (f) written fact-findings. See *Morrissey v. Brewer*, 408 U.S. 471, 487-490 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1972).^{*} There is nothing in the record of the proceedings below which would even remotely suggest that the District Court deprived the defendant of any of these rights.

Indeed, if the essence of Kestenbaum's amorphous argument is that, while the District Court in no way indicated that he was not entitled to a hearing at which he could present witnesses and confront adverse wit-

* Although both *Gagnon* and *Morrissey* related to administrative proceedings, it appears that these requirements apply equally to judicial proceedings. Cf. *United States v. Carfora*, 489 F.2d 354, 359 n. (2d Cir. 1973) (dissenting opinion).

nesses, the failure to specifically advise the defendant of these rights rendered his admission involuntary, the record below clearly rebuts this claim. First, less than eight months earlier, after his first probation violation, Kestenbaum had specifically been advised of these rights:

"Q. Mr. Kestenbaum, do you realize that if you did not admit specification No. 3 that the probation would have to prove the specification against you? A. Yes.

Q. Do you know that the Government would have to call witnesses and your counsel would be entitled to cross-examine those witnesses? A. (nodding head).

The Court: The record should reflect the probationer had nodded yes to both of those questions." (App. 25-26).

There has been no assertion by Kestenbaum or his counsel that he had forgotten this instruction by the time he came to admit to his second violation.

Second, not only has the defendant failed to claim that he was unaware of his rights, but he also has never contended that he would have insisted on a hearing if he had been advised of them. This omission is fatal to the defendant's due process claim. See *Kelleher v. Henderson*, Dkt. No. 75-2137, slip op. 2007, 2012-12 (2d Cir. Feb. 18, 1976); *Grant v. United States*, 451 F.2d 931 (2d Cir. 1971); *Serrano v. United States*, 442 F.2d 923 (2d Cir.), cert. denied, 404 U.S. 844 (1971); *Jones v. United States*, 440 F.2d 466 (2d Cir. 1971); *United States v. Welton*, 439 F.2d 824, 826 (2d Cir.), cert. denied, 404 U.S. 859 (1971).*

* So vague is Kestenbaum's delineation of the "grievous loss" suffered that it may also be interpreted as stemming from a failure of the District Court to advise him of the maximum pos-

[Footnote continued on following page]

sible sentence in the second revocation proceeding. If this be the essence of his "grievous loss", it is noteworthy that there is no contention here, nor was there in the Court below, that Kestenbaum was in fact not fully aware of the possible sentencing ramifications of his admissions. Undoubtedly, this is intentional as the record clearly would not support such a contention.

Firstly, Kestenbaum was, of course, advised at the time of his plea of guilty of the maximum penalties which he faced upon sentence (App. 12-13). More importantly, in February, 1975 at the time of his first revocation proceeding, Kestenbaum was specifically advised by the Court that should he admit a specification of the probation revocation petition, he might be sentenced to the maximum penalty provided by law.

"Q. Basically, the charge against you in this violation of probation is that you did not repay a sum of money which was to be in restitution. Do you understand that? A. Yes.

Q. *Do you understand that by admitting this particular violation of probation it is possible for this Court to put you in jail or continue you on probation?* A. Yes, sir.

The Court: *What would the maximum be?*

Mr. Rosenthal: *Ten years and/or a thousand dollars fine.*

Q. *Did you hear that?* A. Yes, sir.

Q. *And you are still willing to admit the violation, is that right?* A. Yes" (App. 25-26) (emphasis added).

Finally, nine months later, after Kestenbaum's admission to a second probation violation, the Court specifically advised him that when the Sections 5010(e) study was completed, it was likely that he would be sentenced to jail.

"The Court: Mr. Kestenbaum, I came out here fully intending to put you in jail for two years. You have had now three bites out of the apple. There was the first offense and the violation of probation and now a second violation. Three times. The first two times, I went along with the hope that you could be completely rehabilitated on the outside. Your counsel, the Probation Department, the government, all feel that you need to be detoxified; that you lack responsibility; you have got to get out on your own that you have got to go and grow up. It was my impression that you did not deserve another chance. I am not terribly sure that you do.

I want you to know, Mr. Kestenbaum, that the imposi-

[Footnote continued on following page]

POINT II

The imposition of a sentence of incarceration in addition to Kestenbaum's prior probation did not violate the double jeopardy clause.

Kestenbaum contends that the District Court should have credited the time he spent on probation against the sentence imposed and that the failure to do so amounted to a violation of the Double Jeopardy Clause of the Fifth Amendment. This claim is frivolous.

Section 3653 of Title 18, United States Code provides that, upon revocation of probation, a District Judge, who has initially suspended the imposition of sentence, "may impose any sentence which might originally have been imposed." It has long been recognized that the failure to credit time spent on probation to a later sentence of imprisonment imposed after probation has been revoked does

tion of probation on one count does not mean that you are going to get it. If the study shows me exactly what I think it is going to show, then under the first count of the indictment I am going to remand you for a jail sentence." (App. 39-40).

In light of the notice of the maximum penalty provided Kestenbaum at the time of his original plea of guilty and at the time of his admission to the first probation violation, it would be frivolous to now contend that at the time of his second admission he did not fully understand its potential ramifications. Equally, it would be preposterous to contend that such ignorance would not have been brought to the attention of the Court by appropriate motion during the eighty day period between Kestenbaum's revocation of probation in October, 1975, when the Court announced its expectation of the imposition of a jail sentence, and his incarceration in January, 1976. Finally, assuming *arguendo* that Kestenbaum was actually unaware of the maximum sentence he faced, no claim has been made that he would have acted differently had he been aware. See *Keleher v. Henderson, supra*, Dkt. No. 75-2137, slip op. 2007.

not deprive a defendant of any rights under the Fifth Amendment. The rationale for this rule was set forth by Judge Swan in *Kaplan v. Hecht*, 24 F.2d 664 (2d Cir. 1928):

"The purpose [of probation] is to avoid imprisonment so long as the guilty man gives promise of reform. Clearly, therefore, probation is not intended to be the equivalent of imprisonment. The aim of the statute [former 18 U.S.C. § 225] is reformatory, not punitive . . ." Id. at 665.

See also United States v. You, 159 F.2d 688 (2d Cir. 1947); *Baber v. United States*, 368 F.2d 463 (5th Cir. 1966); *Thomas v. United States*, 327 F.2d 795 (10th Cir.), cert. denied, 377 U.S. 1000 (1964); *Allen v. United States*, 209 F.2d 353 (6th Cir. 1953), cert. denied, 347 U.S. 970 (1954); *United States v. Guzzi*, 225 F.2d 725 (3rd Cir. 1960); *Gillespie v. Hunter*, 159 F.2d 410 (10th Cir. 1947). Since probation is not recognized as punishment, it need not be credited to the defendant's period of incarceration.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

JOHN P. COONEY, JR., being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 8th day of April, 1976 he served a copy - the within BRIEF for the USA by placing the same in a properly postpaid franked envelope addressed:

Theodore Rosenberg, Esq.
125 Schermerhorn Street
Brooklyn, New York 11201

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

John P. Cooney Jr.
JOHN P. COONEY, JR.
Chief, Narcotics Unit

8th day of April, 1976

Wm. B. Larson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-676-1430 Qualified in Kings Co.
Commission Expires March 30, 1977

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